



DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

REPLY TO
ATTENTION OF

AFLG-PR

30 October 1997

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 98-3

1. This CIL contains information on the following subjects:

- a. Contracting Officer's Representative Training
- b. Court of Federal Claims Summary.

2. Contracting Officer's Representative Training.

a. References:

(1) CIL 96-17, dated 21 March 1996, Subj: SAB.

(2) CIL 97-6, Attachment (Encl 6) dated 15 October 1996, Subj: COR AOCI Training Lessons Learned.

b. The following information is provided for your information and planning purposes only:

The U.S. Army Logistics Management College (ALMC) schedule for the FY 98 Contracting Officer Representative (COR) Course includes several FORSCOM sites and their dates are as follows:

National Training Center:

Class No. 205, 3 Nov 97 - 7 Nov 97, Satellite Mode

Class No. 208, 2 Feb 98 - 6 Feb 98, Satellite Mode

POC: Franscene Allen, DSN 470-3311

Fort Lewis:

Class No. 209, 2 Feb 98 - 6 Feb 98, On-Site

POC: Karen Hopps, DSN 357-2322

Fort Campbell:

Class No. 210, 2 Feb 98 - 6 Feb 98, Satellite Mode

POC: Jackie Williams, DSN 635-3908

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Fort Stewart:

Class No. 214, 13 Apr 98 - 17 Apr 98, Satellite Mode

POC: Beverly Fordham, DSN 870-2309

Fort Carson:

Class No. 215, 13 Apr 98 - 17 Apr 98, Satellite Mode

POC: Cathy Irwin, DSN 691-8317

Fort Polk:

Class No. 216, 13 Apr 98 - 17 Apr 98, Satellite Mode

POC: Tami Culbreath, DSN 863-1856

Fort Drum:

Class No. 218, 13 Apr 98 - 17 Apr 98, Satellite Mode

POC: Arlene Williams, DSN 341-5118

Fort Bragg:

Class No. 220, 13 Jul 98 - 17 Jul 98, Satellite Mode

POC: Linda Shelton, DSN 236-3806

Fort Hood:

Class No. 222, 13 Jul 98 - 17 Jul 98, Satellite Mode

POC: Debbie Telles, DSN 738-2013

c. HQ FORSCOM anticipates an ever greater demand for training of CORs as a result of on-going Commercial Activities studies, therefore please assist us by ensuring all quotas for the classes are filled. In an effort to support you in your training of COR's HQ FORSCOM has requested, from ALMC, the re-certification of Ms. Beverly Thomas as an Accredited Off Campus Instructor (AOCI) for the Contracting Officer's Representative (COR) Course and when that re-certification is received you will be notified.

d. If additional information is needed contact Ms. Sandra Bruner, DSN 367-6296 or Commercial 404/464-6296 or E-mail bruners@ftmcphsn-emhl.army.mil.

3. Court of Federal Claims Summary.

a. HQ FORSCOM recently had its first Post-Award Bid Protest case before the U.S. Court of Federal Claims.

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Enclosed is a case summary and brief analysis of the case prepared by the FORSCOM Staff Judge Advocate Office. The complete opinion can be found at <http://sage.ogc.doc.gov/OGC/fl/cld/rd/97-90C.html> for those interested in reading the entire opinion.

b. The case involved a Request for Proposal DAKF40-95-R-0006 for Family Housing Maintenance and Operation of the U-DO-IT Center at Fort Bragg, NC. The incumbent and unsuccessful offeror, Day and Zimmermann Services (DZS), protested the award of the contract and challenges the Army's evaluation of its proposal using "cost realism", in addition to the Army's decision not to communicate clarifications or conduct discussions with respect thereto.

c. Several recent and similar cases prompted the following comments in the October 1997 issue of the "Nash and Cibinic Report" which referenced the DZS case. The following appears as a word of caution when using "cost realism analysis":

"It appears that award without discussions is especially hazardous when the agency has used cost realism analysis to make significant adjustments in determining the probable cost of performance of a cost-reimbursement contract. In that situation, the need for discussions is so strong that an agency is well advised to have discussions with the offerors even though it prolongs the procurement process.

Cost realism analysis requires the agency to adjust each offeror's proposed cost estimate to reflect its "best estimate" of the cost of performance. This assumes that the government fully understands how the offeror intends to perform the work and has the necessary information to make an adjustment to the costs proposed. The fact that this assumption is incorrect is attested to by the numerous protests in this area that are sustained. Therein lies the caution that these situations should be handled with care. In almost all instances, the Contracting Office is well advised to discuss the adjustments with the offeror to ensure that they are not based on incorrect understandings of what the offeror is proposing or poor information about

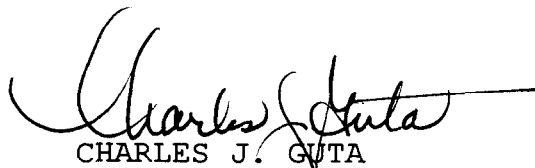
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the amount of the adjustment.

We are not saying that discussions are absolutely required when making cost realism adjustments. If an agency has good information and uses clear reasoning, discussions will not be required. But cost realism analysis requires a determination of what it will most likely cost the specific offeror to perform the work. In many cases, this is a very difficult determination to make without face-to-face discussions with that offeror."

d. If additional information is needed contact Sandra Bruner, DSN 367-6296 or E-mail bruners@ftmcpshn-emh1.army.mil.



Encl
as

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DAY and ZIMMERMANN SERVICES v. United States
United States Court of Federal Claims No. 97-90C, July
14, 1997

Digest - A recent *Bid Protest* decision of the United States Court of Federal Claims overturns Ft Bragg's CPAF award of housing maintenance contract citing Army's failure to provide critical government cost-evaluation documents to Protester and the Court.

Judge Gibson enjoined, canceled, and set aside the Army's award of its CPAF housing maintenance contract covering more than 5,000 family housing units at Ft Bragg. This bid protest decision highlights the need for having a complete administrative record.

The Army's efforts to correct the error on the final day of the hearing were rejected by the Court when the missing MPCE document was finally offered into the record. The Court refused to admit the document, stating that to do so would be fundamentally unfair to the Protester.

The Court found the Army to have improperly secreted critical information in the MPCE, favorable to the Protester, from both the Protester and the Court, and in so doing violated pertinent statutory and regulatory provisions, including applicable federal discovery procedures. The Court then upheld the Protester's contention that the Army arbitrarily and capriciously determined the MPCE for the DZS proposal, and that such conduct was prejudicial to the Protester's opportunity to otherwise be properly evaluated for the award.

After enjoining the award, the Court also ordered the opening of discussions with **Day and Zimmermann** (hereafter **DZS**), as well as other eligible competitors, prior to any re-evaluation of BAFO's and effort at re-award of the contract.

The facts are briefly summarized: On Feb 1, 1996, the Army issued an RFP for Family Housing Maintenance and Operation of the U-Do-It center at Ft Bragg. The RFP contemplated award of a CPAF contract to provide a broad range of maintenance and repair functions for a base year, together with four one-year option periods. **DZS** was the incumbent, and its proposal was among thirteen (13) firms offering on this solicitation.

Ft Bragg used Formal Source Selection procedures, including a Source Selection Authority, an SSAC, and a Source Selection Evaluation Board (SSEB). A Cost Committee, comprised of one Cost Evaluator, was used to advise the SSEB on cost evaluation. The Cost Evaluator used a variety of factors to arrive at the MPCE, including the Independent Government Estimate, and the written comments from the SSEB's Technical and Management Committees.

From this, a 36 page MPCE was developed. The MPCE cost-realism analysis took the Protester's initial cost proposal of \$36.8M and added to it another \$2.46M of mostly direct-labor costs, leaving an MPCE for the Protester of \$39.3M. By contrast, the winning proposal was given an MPCE of \$38.87M, reflecting a much smaller adjustment of only \$1.86M.

The Army, based on the terms of the solicitation, awarded on initial proposals without discussions. After the Army's upward cost adjustments to the initial proposals of both DZS and the winning offeror, **DZS** had lost its initial \$168K cost advantage, and the award.

Having properly notified all offerors of the possibility of award without discussions, one might have expected little or no controversy over this issue. However, contrary to the traditional GAO approach and it's typical position in upholding such Agency decisions, the Court of Federal Claims found the 'award on initials' to be unsupported.

Curiously, although not legally bound by GAO decisions, the Court, in reasoning its decision, based

much of its rationale on the prior GAO case of (Jonathan Corp., B-251698.3, 93-2 CPD, May 17, 1993). Contrary to mainstream GAO decisions, in *Jonathan* the GAO went against its traditional support for exercise of KO discretion, and rejected as unreasonable and arbitrary a Navy Contracting Officer's decision to award without discussions. This result was in spite of the solicitation's similar notice that the Navy's award might be made on the initial proposals.

In *Jonathan*, the GAO found the Navy Contracting Officer's decision to award without discussions improper in the face of numerous unresolved questions raised by many of the proposals. This, together with a significant upward cost-adjustment made by the Navy during the course of their cost-realism analysis, apparently formed the basis for the GAO's rejection of the KO's decision not to hold discussions.

The Court in *DZS*, according to the published decision, was highly persuaded by the GAO's reasoning in *Jonathan*, and Contracting Officers should take note of both these cases in weighing future decisions, particularly in cases of cost contracts where Army cost-realism is a significant factor, and analysis results in significant changes to competitors' initial-offer cost estimates. Questions raised by these changes should be considered in the course of full and meaningful discussions.

And of course, the final lesson from this case obviously dictates that Contracting Officer's ensure their Protest Administrative Reports include all relevant documents reflecting and documenting evaluators' Cost Analysis, particularly where government Cost Evaluators have significantly modified offerors' initial cost estimates. Omission of such critical documents can occasionally become the pivotal issue and a fatal barrier to overcoming the protest - regardless of whether such protest is before the GAO or a federal court.